IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 352 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MOHMMAD IQBAL YAKUBBHAI SHAIKH
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 352 of 1998
MS BANNA S DUTTA for appellant.
MR BD DESAI, ADDL.PUBLIC PROSECUTOR for Respondent

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.H.KADRI

Date of decision: 15/01/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, is directed against judgment dated February 17, 1998, rendered by the learned Additional Sessions Judge, Court No.16, Ahmedabad, in Sessions Case No. 149/1997, by which the appellant is convicted of the offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the Act" for short) and sentenced to suffer R.I. for 10 years and fine of Rs.1 Lac, in default, R.I. for one year.

2. Mr.Sureshbhai Vishaldas Tahelramani was discharging duties as Police Inspector in State CID Crime, Narcotic Cell. On May 7, 1997, he had received an information from his informer at about 3.45 P.M. to the effect that a person named Mohmed Iqbal Yakubbhai Shaikh, who had put on bushirt having checks and snuff-coloured pant, was selling narcotic substance at a culvert on Canal road, near Ramol Octroi-Naka. On receiving the said information, Mr.Tahelramani had made necessary note in the register. He had also given necessary intimation to Mr.Vikas Sahay, who was then Superintendent of Police, Narcotic Cell, about secret information received by him. Thereafter he had instructed police constable Dilipsinh Chavda to summon two panch witnesses. Accordingly, police constable Dilipsinh Chavda had summoned, (i) Rajubhai Ishwardas Punjabi, and (ii) Jitendrabhai Narandas as panch witnesses. On arrival of panch witnesses, P.I. Mr.Tahelramani had made them aware about the information received by him. On learning about the information received by P.I. Mr.Tahelramani, the above referredto two persons had shown willingness to act as panchas and, therefore, a raiding party was constituted by P.I. Mr.Tahelramani. The panch witnesses and police officers had searched persons of each other, but nothing incriminating was found from any of them. Thereafter first part of panchnama was drawn between 16.15 P.M. and 16.30 P.M. and the raiding party had proceeded towards Ramol village in a government vehicle. When the raiding party reached near Municipal Octroi-Naka, the informer had identified a person standing near culvert as Mohmed Iqbal. On seeing the police party, the person identified as Mohmed Iqbal had started running, but had fallen down and, therefore, he was caught by Head Constable Harjitsinh Parmar. Thereafter in presence of panch witnesses, the person caught by Head Constable Harjitsinh Parmar was interrogated and he had disclosed his name as Mohmed Iqbal Yakubbhai Shaikh i.e.the appellant, and

informed P.I. Mr.Tahelramani that he was residing in Khanvali, Jahangir Chawl, Ramol Road. P.I. Mr.Tahelramani had told the appellant that an information was received that he was selling narcotic substance and, therefore, it was necessary to search his person and that he could be taken to the nearest Gazetted Officer or to the nearest Magistrate if he so required for search of his person. However, the appellant had not required P.I. Mr.Tahelramani to search his person in presence of a Gazetted Officer or a Magistrate and, therefore, a written report was prepared wherein necessary facts indicating unwillingness on the part of the appellant to be searched in presence of a Gazetted Officer or a Magistrate were mentioned. It was also offered by P.I. Mr.Tahelramani that the appellant was free to effect search of police personnel and panch witnesses, but the appellant had declined the said offer. Thereafter the person of the appellant was searched and from right hand pocket of the pant put on by him a small packet was recovered. On unfolding the same, it was found that there was a small plastic bag containing ash-coloured powder. It was further found that small plastic bag was containing another small plastic bag which was sealed with heat. After removing the outer plastic bag, the plastic bag containing ash-coloured powder was given to the members of raiding party, who had, after smelling the same, identified as containing a narcotic substance because of peculiar smell. Thereafter Head Constable R.B.Thaker had weighed the substance found from possession of the appellant, and it was found that weight of the substance found from possession of the appellant was 5 grams 600 milligrams (5.600 Grams) with plastic bag. Thereafter small tin box was requisitioned wherein heat sealed plastic bag containing ash-coloured powder was placed and the tin was wrapped with paper wherein slip containing signatures of panch witnesses was also placed. Thereafter the sample was packed with a twine and seal bearing mark "P.I.,N.D.P.S.,G.S.,C.I.D.Crime, Ahmedabad" was applied thereon. After sealing the sample, residential house of the appellant was searched, but nothing incriminating was found from his house. The second part of the panchnama was prepared thereafter between 17.15 PM and 18.35 PM. After preparation of panchnama, P.I. Mr.Tahelramani had prepared complaint, which was reduced into writing by his head constable. Further, forwarding note was also prepared for sending the sample to Forensic Science Laboratory for analysis. Initially, P.I. Mr.Tahelramani had presented the appellant at Vatva G.I.D.C. Police Station and lodged complaint which was registered as Prohibition C.R.No.1215/97. However, later on it was learnt that the

place from where the appellant was found in possession of narcotic substance was falling within the jurisdiction of Amraiwadi Police Station and, therefore, P.I. Mr.Tahelramani had presented the appellant at Amraiwadi Police Station and lodged his complaint. P.I. Mr.Tahelramani had handed over documents, such as his complaint, panchnama, muddamal, appellant etc. to Ratanji Rajaji Dabhi, who was then P.S.O. of Amraiwadi Police Station. P.S.O. Mr.Dabhi had taken charge of things handed over to him and made necessary entry in the police station diary. Further, he had handed over investigation of complaint filed by Mr.Tahelramani to Mr.Navalsinh Shivubha Zala, who was then P.S.I. of Amraiwadi Police Station for investigation. The investigating officer had recorded statements of persons who was found conversant with the facts of the case. The complaint lodged by P.I. Mr.Tahelramani was registered as Prohibition C.R.No.5215/97 and muddamal handed over was kept in safe-custody, as it was to be forwarded to Forensic Science Laboratory for analysis. Next day in the morning, Head Constable Chimanbhai Ramabhai had taken over charge as P.S.O. of Amraiwadi Police Station and, therefore, Head Constable Mr.Dabhi had handed over muddamal in sealed condition to Head Constable Chimanbhai Ramabhai. Chimanbhai Ramabhai had in turn handed over muddamal to Head Constable Baldevbhai Mohanbhai for being forwarded to Forensic Science Laboratory. Head Constable Baldevbhai Mohanbhai had delivered the muddamal article to Forensic Science Laboratory on 8.5.1997. On analysis, the substance found from possession of the appellant was ascertained to be 'heroin' and copy of report was sent to investigating officer. On conclusion of investigation, the appellant was chargesheeted in the Court of learned Metropolitan Magistrate, Ahmedabad for commission of offence punishable under Section 22 of the Act. As offence punishable under Section 22 of the Act is triable by a Special Court, the case was committed to City Sessions Court, Ahmedabad for trial, where it was numbered as Sessions Case No.149 of 1997.

3. The learned Additional Sessions Judge had framed charge against the appellant at Exh.1 of the offence punishable under Section 22 of the Act. The charge was read over and explained to the appellant, who had not pleaded guilty to the same and claimed to be tried. The prosecution had, therefore, examined (i) Rajubhai Ishwardas Punjabi, PW.1 at Exh.7, (ii) Jitendrabhai Narandas, PW.2 at Exh.8, (iii) Rajendraprasad Bhagwatprasad Thaker, PW.3 at Exh.9, (iv) Sureshbhai Vishaldas Tahelramani, PW.4 at Exh.11, (v) Ratanji Rajaji Dabhi, PW.5 at Exh.22, (vi) Chimanbhai Ramabhai, PW.6 at

Exh.25, (vii) Baldevbhai Mohanlal, PW.7 at Exh.27, and (viii) Navalsinh Shivubha Zala, PW.8 at Exh.29, to prove its case against the appellant. The prosecution had also produced documentary evidence, such as intimation given by P.I. Mr.Tahelramani to Superintendent of Police about secrete information received by him at Exh.13, report indicating compliance of Section 50 at Exh.14, panchnama indicating seizure of offending article from the possession of the appellant at Exh.15, complaint lodged by P.I. Mr.Tahelramani at Exh.16, forwarding note sent to Forensic Science Laboratory at Exh.17, seizure memo at Exh.19, document indicating communication of ground of arrest of the appellant at Exh.20, necessary extract of police station diary at Exh.23, document indicating handing over of muddamal to P.S.O. of Amraiwadi Police Station at Exh.26, report of analysis at Exh.31 etc. in support of its case against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge had explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by Section 313 of the Code of Criminal Procedure. In his further statement, the case of the appellant was that he was plying a rickshaw and as he had an altercation with police constable Dilipsinh Chavda regarding fair to be charged, he was falsely implicated in the case, but he was innocent. He had expressed desire that he would like to examine Forensic Science Laboratory officer as his defence witness and, therefore, Prahaladrai Labhshanker Joshi, who was Assistant Director of Forensic Science Laboratory, Junagadh, was examined as D.W.1 at Exh.36.

5. On appreciation of evidence adduced by the parties, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that on May 7, 1997 at about 18.05 hours the appellant was found in possession of 5 grams 600 milligrams (5.600 grams) of narcotic substance, without any permit, near Municipal Octroi-Naka, Ramol Canal road, Ahmedabad and had committed offence punishable under Section 22 of the N.D.P.S.Act. From the record it transpires that the learned Additional Public Prosecutor, who had presented the case on behalf of the State Government before the learned Judge, had pointed out that the substance found from possession of the appellant was a manufactured drug and not a psychotropic substance and, therefore, charge should be altered and the appellant should be convicted under Section 21 of the Act. The learned Judge was of the view that no prejudice was likely to be caused to the

appellant if the charge was altered and, therefore, after exercising powers under Section 21 of the Cr.P.C., the charge was altered indicating that the appellant had committed offence punishable under Section 21 of the Act and not under Section 22 of the Act as was earlier mentioned in the charge. Ultimately, by the impugned judgment, the appellant has been convicted of the offence punishable under Section 21 of the Act and sentenced to suffer R.I. for 10 years and fine of Rs. 1 Lac, in default, R.I. for one year by the impugned judgment, giving rise to instant appeal.

6. What was argued by Ms.Banna Dutta, learned advocate of the appellant, was that no satisfactory evidence is led by the prosecution to establish that the offending substance, which was found from possession of the appellant, was sent to Forensic Science Laboratory for analysis and, therefore, the impugned judgment should be set aside. Elaborating the said argument, it was contended that there are over-writings with regard to date of offence as well as police station at which the appellant was presented after raid was over, which is quite evident from the report made by P.I. Mr.Tahelramani to his superior officer and, therefore, the learned Judge was not justified in convicting the appellant of the offence with which he was charged. According to the learned counsel of the appellant, evidence of Ratanji Rajaji Dabhi, PW.5 Exh.22, shows that he had not sealed the muddamal nor had handed over the same to crime writer and as the identity of muddamal article seized from the appellant is not established, benefit of reasonable doubt to which the appellant is entitled to, should be given. The learned counsel of the appellant emphasised that the evidence of witness Rajendraprasad Bhagwatprasad Thaker, PW.3 Exh.9 and that of Sureshbhai Vishaldas Tahelramani, PW.4 Exh.11, read with contents of panchnama Exh.15 and complaint filed by Mr.Tahelramani which is produced on record of the case at Exh.16, establishes that what was recovered from possession of the appellant was ash-coloured powder, whereas report of Forensic Science Laboratory establishes that what was analysed was almond-coloured powder and as identity of offending article recovered from possession of the appellant is not established beyond reasonable doubt, the appeal should be accepted. After pointing out glaring defects in the evidence of P.I. Mr.Tahelramani, it was contended that it is not safe to rely upon the deposition of police officials, more particularly when witness Rajendraprasad Bhagwatprasad Thaker has admitted in his evidence that he had not stated in his police statement that the muddamal was sealed in his presence

and as there is serious doubt about identity of the offending article seized from the appellant and the article analysed by Forensic Science Laboratory, the appeal should be allowed. The learned counsel pointed out that in order to establish compliance of mandatory provisions of the Act, prosecution has produced certain documents which show that printed forms were used wherein blanks were filled in by P.I. Mr.Tahelramani; whereas document, indicating the fact that the appellant was communicated ground of arrest, was never signed by P.I. Mr.Tahelramani and in view of inherent defects in the prosecution case, judgment impugned should be set aside. What was maintained was that the evidence on record has not been properly appreciated in right perspective by the learned Judge of the trial Court and, therefore, the appeal should be allowed.

7. Mr.B.D.Desai, learned Additional Public Prosecutor, argued that after recovery of offending article from possession of the appellant, the same was sealed and the sealed tin was sent to Forensic Science Laboratory for analysis which was found in intact condition and, therefore, it is wrong to contend that identity of the article seized from the possession of the appellant is not established. According to the learned counsel of the State Government, discrepancy regarding description of colour of offending article found from possession of the appellant is trivial in nature and no undue importance should be given to the same as is sought to be given by the learned counsel of the appellant. It was emphasised that the offending substance was found in a plastic bag which was sealed with the help of heat and the plastic bag sealed with heat had reached the Forensic Science Laboratory, which stands established from the report of the Forensic Science Laboratory and, therefore, there is no manner of doubt that the substance found from the possession of the appellant was analysed by the Forensic Science Laboratory. The learned A.P.P. urged that the so-called discrepancies appearing in the evidence of P.I. Mr.Tahelramani do not affect the substratum of the prosecution case and, therefore, the appeal should be dismissed, more particularly when it is not pointed out to the Court that mandatory provisions of the Act were not complied with by the prosecution.

8. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence with reference to broad and reasonable probabilities of the case. From the evidence of Sureshbhai Tahelramani, PW.4 Exh.11, it is evident that secrete information received by him from his

informer was that a person named Mohmed Iqbal Yakubbhai Shaikh was selling narcotic substance near culvert situated on canal road, near Ramol Octroi-Naka. His evidence further shows that during the search of person of the appellant, a packet was recovered from right hand pocket of pant put on by the appellant and that when the said packet was unfolded, a small plastic bag was found. His evidence further shows that the plastic bag was containing ash-coloured powder and the members of the raiding party had, by smelling, ascertained that the powder placed in the plastic bag was a narcotic substance. It is indicated in his evidence that corner of the plastic bag was cut and it was found that there was another small plastic bag which was sealed with heat. It is relevant to notice that the substance found in the plastic bag was never taken out, nor weighed and according to the prosecution, weight of the substance found with plastic bag was 5 grams 600 milligrams with plastic bag. Further, no cash was found from the possession of the appellant nor any incriminating article was found when his residential house was extensively searched. No effort was made by Mr.Tahelramani to find out as to from whom the appellant had obtained possession of the offending substance nor any evidence could be adduced to establish that the appellant was selling narcotic substance. Further, witness Rajendraprasad has in terms admitted that if a substance is kept in a plastic bag which is sealed with heat, it would be difficult to ascertain the smell of the substance. The striking feature of the case is that Exh.17, which is the forwarding note prepared while sending the offending substance found from the possession of the appellant to Forensic Science Laboratory for analysis, is carbon copy of original document, but carbon copy bears original signature of P.I. Mr.Tahelramani. Exh.17 would indicate that the offending article was seized on July 5, 1997, but thereafter the date is overwritten indicating that the offending substance was seized on May 7, 1997. Further, the evidence of Baldevbhai Mohanlal, PW.7 Exh.27, would indicate that in original forwarding note prepared while sending the offending substance to Forensic Science Laboratory for analysis, the name of police station mentioned was Vatva G.I.D.C and that Prohibition C.R.No. 1215/97 was mentioned. This assertion made by witness Baldevbhai Mohanlal stands corroborated by contents of Exh.17. However, P.I. Mr.Tahelramani, in his substantive evidence before Court which was recorded on oath, has maintained that though name of police station in the forwarding note was mentioned as Vatva G.I.D.C., no Prohibition C.R.No.1215 was registered. He has also maintained that date of May

7, 1997 mentioned in the forwarding note, was not tampered with nor overwritten and the date mentioned was May 7, 1997. This assertion made by Mr.Tahelramani is contrary to the evidence on record. Instead of denying obvious facts, Mr.Tahelramani should have tried to explain the discrepancies. He should have also mentioned in his deposition as to which steps were taken by P.S.O. of Vatva G.I.D.C. Police Station when muddamal was handed over after registration of offence. P.I. Mr.Tahelramani has failed to give full amount of the seizure and denied facts which can hardly be disputed. False assertions made by Mr.Tahelramani persuade this Court to hold that P.I. Mr.Tahelramani is not a witness of truth. What is relevant to notice is that the report of Forensic Science Laboratory, which is on record of the case at Exh.31, mentions that the offending substance was received by the Forensic Science Laboratory for analysis along with forwarding letter dated July 5, 1997. Under the circumstances, a question arises whether the substance which was found from the possession of the appellant was analysed by the Forensic Science Laboratory or any other substance which might have been recovered on July 5, 1997 from someone, was analysed. Somewhere some bungling has taken place which is not explained at all. On appreciation of evidence, this Court is of the view that no cogent and reliable evidence has been adduced by the prosecution to establish that the substance which was found from the possession of the appellant on May 7, 1997, was analysed by the Forensic Science Laboratory. In the light of above referredto glaring discrepancies appearing in the evidence of prosecution case, the plea raised by the learned counsel of the appellant regarding colour of the substance found from the possession of the appellant and colour of the substance analysed by the Forensic Science Laboratory will have to be considered. The evidence of P.I.Mr.Tahelramani would indicate that he was discharging duties as Police Inspector of Narcotic Cell, State CID Crime. So also, the evidence of Rajendraprasad Bhagwatprasad Thaker, PW.3 Exh.9, shows that he was discharging duties as a head constable in Narcotic Cell of State CID Crime. Thus, the evidence of these police officers makes it clear that they were discharging duties in a Special Cell created for detection and investigation of offences under the Act and well conversant with manufactured drugs, narcotic substances etc. Both these police officials, in no uncertain terms, have stated before the Court that the substance, which was found in plastic bag, was ash-coloured. The colour of the substance found in the plastic bag is also mentioned to be ash in the panchnama as well as the complaint which was filed by

Mr.Tahelramani. However, undisputedly, report of Forensic Science Laboratory mentions that the powder analysed was almond-coloured. The police officials, who are not novice, are not likely to commit mistake about the colour of the offending substance found from the possession of the appellant; whereas it is nobody's case that the report of Forensic Science Laboratory, which mentions that the substance analysed was almond-coloured, is either false or untrue. This material discrepancy is not explained by the prosecution at all. No explanation is given as to how the substance found from the possession of the appellant, which was ash-coloured, had turned into almond-coloured when it was analysed by Forensic Science Laboratory, which raises a serious doubt as to whether the substance analysed by Forensic Science Laboratory was the same which was allegedly found from the possession of the appellant. In absence of any explanation given by any of the prosecution witnesses regarding material discrepancies, a reasonable doubt is created about the case of the prosecution that the substance found from the possession of the appellant was analysed and on analysis it was found to be 'heroin'. After analysing, sifting and assessing the evidence on record with particular reference to its trustworthiness and truthfulness by a process of dispassionate judicial scrutiny, this Court finds that the material discrepancies appearing in the prosecution case have not been explained by any of the prosecution witnesses and, therefore, the appellant is entitled to benefit of a reasonable doubt. The net result of the above discussion is that the judgment impugned in the appeal cannot be sustained and will have to be set aside.

For the foregoing reasons, the appeal succeeds. Judgment dated February 17, 1998 rendered by the learned Additional Sessions Judge, Court No.16, Ahmedabad, in Sessions Case No.149 of 1997 convicting the appellant of the offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentencing him to suffer R.I. for 10 years and fine of Rs.1 Lac, in default, R.I. for one year, is hereby set aside. The appellant shall be set at liberty forthwith, unless his presence is needed with reference to any other case. The appeal stands accordingly allowed. Muddamal to be disposed of in terms of directions given in the judgment which is impugned in the appeal.

(J.M.Panchal,J.)

(M.H.Kadri, J.)

(patel)